

**IN THE SUPREME COURT  
STATE OF MISSOURI**

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IN RE:

MICHAEL M. SEBOLD,

Respondent.

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Supreme Court No. SC92047

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**RESPONDENT'S BRIEF**

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Michael M. Sebold, #43248

Respondent, *pro se*

[msebold55@gmail.com](mailto:msebold55@gmail.com)

5509 Duchesne Parque Dr.

St. Louis, Missouri, 63128

(314) 849-8992 – Phone

(314) 849-8992 - Facsimile

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## **STATEMENT OF FACTS**

Respondent admits and concedes that on or about June 21, 2010, he drove while intoxicated in Jefferson County, Missouri. He admits that he drove a vehicle without an ignition interlock device. He admits that both of these were violations of the conditions of probation imposed by the Jefferson County Circuit Court following August 2007 and June 2008 DWI incidents. With respect to the third incident, Respondent pleaded guilty to felony as a repeat or persistent offender. Respondent admits and regrets that his actions were dangerous, and that they reflect badly on a member of the bar and on the legal profession.

Respondent's problems with alcohol first occurred only during the last few years. Respondent first began drinking in any significant manner in 2005 following a painful separation and divorce.<sup>1</sup> For the vast majority of his life, Respondent simply did not drink, or at best, drank very rarely. Affidavit of Sophia Kim ("Kim"), Appendix ("Appx") p. 2. Respondent and Kim were married in 1982. *Id.* They raised three children in Fairfax County Virginia, before divorcing at the end of 2005. The couple met through a religious community that both had been active in since the 1970s. *Id.*

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<sup>1</sup> Respondent, appearing *pro se*, acknowledges that the factual statements he makes herein are subject to the mandates of Rule 55.03(c), and he avers that they are true and correct to the best of his knowledge, information, and belief.

This community strongly disapproved of drinking or illicit drug use.<sup>2</sup> Both Respondent and Kim were employed by businesses that were affiliated with the religious community. Appx p. 2. The family socialized primarily with other members of the religious community. *Id.* Alcohol was not present at business or social gathering. *Id.* To the best of their knowledge, the persons Respondent and his ex-wife worked and associated with did not consume alcohol in any significant manner. *Id.* Alcohol was rarely, if ever, kept the couple's home, and simply was not a part of their lives. *Id.*

Following the couple's separation and divorce in 2005, Respondent began to drink as a coping mechanism. Respondent lived alone from 2005 through the summer of 2006, as his children were studying abroad by way of a church-sponsored exchange program. Respondent's drinking at that time was limited to weekends alone at home.

Respondent and his two minor daughters moved to St. Louis in August 2006. From 2006 through the fall of 2009, Respondent was self-employed, working out of his home in St. Louis County. In 2006 Respondent began drinking every day, but this was almost always limited night time when he was alone. Respondent's drinking increased in 2007, with his night-time drinking sometimes continuing through the next day while his children were at school.

In August 2007, Respondent was first arrested for a DWI offense, which was pleaded down to a lesser offense. Respondent then realized that he had a drinking

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<sup>2</sup> Reference to the use of alcohol is meant to include the use of non-prescribed narcotics any other recreational or illicit drug.

problem, and he contacted the Missouri Bar's Lawyer Assistance Program ("MOLAP") for assistance. MOLAP referred Respondent to Alcoholics Anonymous ("AA"), which Respondent began attending, and he obtained a sponsor. This was very helpful, and through this, Respondent was able to refrain from drinking for periods of one or two months at a time. After his first offense, Respondent sincerely resolved not to operate a motor vehicle ever again while intoxicated. Respondent would still slip from time to time and drink, but he always drank alone at home or away from any automobile.

Respondent pleaded guilty to a second DWI offense which occurred about June 2008. In that particular instance, to the best of his recollection Respondent had *not* operated a motor vehicle while intoxicated and he was *not* arrested while in his vehicle. The arrest was based solely on the statement of a witness who claimed to have seen Respondent driving. Respondent was found passed out at the time of his arrest, but he had no recollection of driving. Respondent maintained sincere doubts as to the truthfulness of the witness, who ignored subpoenas and failed to give testimony at a court hearing. Respondent ultimately pleaded guilty to a lesser charge to avoid the possibility of a DWI conviction at that time. Respondent maintained sincere doubts as to whether he really had operated a motor vehicle with no recollection of doing so.

All doubts were removed with Respondent's third DWI charge, which occurred in June 2010. After a difficult week at work and while Respondent's children were away for the weekend, Respondent came home on Friday evening, consumed alcohol and passed out. Respondent's next conscious moments were waking up on Monday morning,

in jail, with absolutely no recollection of how he got there. According to police reports, Respondent was found passed out in a motor vehicle at a stop light in Arnold, Missouri.

After the June 2010 incident, Respondent became serious about a total lifestyle change. Respondent came to realize that any alcohol consumption presented an unacceptable risk to him and others. In June 2010 Respondent entered an inpatient treatment program at St. Anthony's hospital that lasted approximately two weeks. Respondent began attending mental health classes at Preferred Family Health Care in St. Louis. Appx p. 4. More recently, Respondent began seeing a therapist to come to terms with his divorce. Appx p. 5. He determined to return to a lifestyle of sobriety, which he has done successfully for approximately nineteen months.

A few months before the June 2010 incident, Defendant began working outside of the home for the first time since his divorce, taking a job with a small law firm in Clayton, Missouri ("Firm"). After Respondent was released from the rehabilitation center in July 2010, Respondent and his immediate supervisor came to an agreement that Respondent could continue working for the Firm only if he agreed to cease all drinking. Affidavit of Mayer Klein, Appx p. 6. Respondent agreed, he has continued working for the Firm, and has been alcohol free for a period fast approaching two years. *Id.*, see also Affidavit of Tim Haywood, Appx p. 9.

Respondent has not completed all of the extensive conditions of the probation imposed by the Jefferson County Circuit Court following his felony guilty plea. However, he continues to comply with the terms of his probation. Respondent continues to attend meetings of Alcoholics Anonymous twice per week or more, Respondent continues to

work with his sponsor. See Appx p. 9. Respondent also assists in sponsorship work with others.



**POINT RELIED ON**

THE COURT SHOULD IMPOSE A DISCIPLINE SHORT OF ACTIVE SUSPENSION BECAUSE ALTHOUGH RESPONDENT ADMITS TO A VIOLATION OF RULE 4-8.4, DISCIPLINE IS IMPOSED BASED ON THE FACTS OF EACH CASE; RESPONDENT'S ACTIONS WERE NOT INTENTIONAL, BUT THE DIRECT RESULT OF DEPRESSION, WHICH RESPONDENT HAS TAKEN ACTIONS TO REMEDIATE; RESPONDENT HAS MADE HIMSELF ACCOUNTABLE TO OTHERS FOR HIS SOBRIETY; AND RESPONDENT HAS SUCCESSFULLY RETURNED TO A SOBER LIFESTYLE.

## ARGUMENT

THE COURT SHOULD IMPOSE A DISCIPLINE SHORT OF ACTIVE SUSPENSION BECAUSE ALTHOUGH RESPONDENT ADMITS TO A VIOLATION OF RULE 4-8.4, DISCIPLINE IS IMPOSED BASED ON THE FACTS OF EACH CASE; RESPONDENT'S ACTIONS WERE NOT INTENTIONAL, BUT THE DIRECT RESULT OF DEPRESSION, WHICH RESPONDENT HAS TAKEN ACTIONS TO REMEDIATE; RESPONDENT HAS MADE HIMSELF ACCOUNTABLE TO OTHERS FOR HIS SOBRIETY; AND RESPONDENT HAS SUCESSFULLY RETURNED TO A SOBER LIFESTYLE.

### **A. Legal Standards**

Rule 4-8.4 provides that “it is professional misconduct for a lawyer to ... (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects ...” Respondent concedes that his guilty plea to felony DWI incident in June 2010, along with his guilty pleas in two other DWI cases dating back to August 2007 constitutes a violation of Rule 4-8.4(b). *In re Stewart*, 342 S.W.3d 307 (Mo. banc 2011). As such, Respondent concedes that discipline is warranted.

Disciplinary proceedings are primarily remedial in nature. *In re Caranchini*, 956 S.W.2d 910, 914 (Mo. banc 1997). The purpose of discipline is not to punish the attorney, but to further the twin purposes of protecting the public and maintaining the integrity of the legal profession. *In re Carey*, 89 S.W.3d 477, 502 (Mo. banc 2002).

In determining the appropriate discipline the Court judges each case on its own facts. *Stewart*, 342 S.W.3d at 309. The Court may initiate four types of discipline:

reprimand; indefinite suspension; suspension for a fixed period; and disbarment. Carey, 89 S.W.3d at 502. In the case of suspension, the Court may impose active suspension, or may permit that such suspension be stayed. Stewart, 342 S.W.3d at 312.

In determining the appropriate discipline, the Court considers the factor set forth in Standard 3.0 of the American Bar Association's *Standards for Imposing Lawyer Sanctions*. In re Belz, 258 S.W.3d 38, 39 (Mo. banc 2008). These are: (1) the duty violated; (2) the lawyer's mental state; (3) the potential or actual injury; and (4) the existence of aggravating or mitigating factors. Stewart, 342 S.W.3d at 309.

In the present case, the duty at issue was the duty of care owed to the general public as well as a duty to protect the integrity of the bar. See Stewart, 342 S.W.3d at 310. Although Respondent does not seek to minimize these duties, the Court has noted that the most important ethical duties are those that an attorney owes to his clients, regarding the safekeeping of client property, diligence, competence, and candor. In re Ehler, 319 S.W.3d 442, 451 (Mo. banc 2010).

In examining the attorney's mental state, the Court must consider the attorney's knowledge of his conduct, and whether he had a "conscious awareness of the nature or attendant circumstances" of such conduct. In re Madison, 282 S.W.3d 350, 360 (Mo. banc 2009). Moreover, the Court should consider the attorney's mental state as it may be affected by marital problems, In re Tessler, 783 S.W.2d 906, 910 (Mo. banc 1990), depression, see Belz, 258 S.W.3d at 39, and other personal problems. In re Kopf, 767 S.W.2d 20, 22 (Mo. banc 1989). These do not excuse an attorney's behavior, they must be considered in evaluating his mental state. Id.

The Court must consider the gravity of the harm that an attorney causes to his client, Ehler, 319 S.W.3d at 452, to the public, or to the integrity and reputation of the legal profession. Stewart, 342 S.W.3d at 310. Petitioner cites several cases for the proposition that severe discipline is appropriate even in the absence of client harm. Informant's brief, p. 8, citing In re Wallingford, 799 S.W. 2d 76 (Mo. banc 1990), In re Kirtz, 494 S.W. 2d 324 (Mo. banc 1973), and In re Panek, 585 S.W. 2d 477 (Mo. banc 1979). However, in the each of these cases the attorney was found to have engaged in fraudulent or deceptive conduct that did not happen to result in client harm. In Wallingford, the attorney was found to have forged her client's name to sworn affidavits. 799 S.W. 2d at 77. In Kirtz, a fraud was perpetrated against non-clients. 799 S.W. 2d 76 at 328-29. In Panek, the attorney in was found to have defrauded a former client. 585 S.W. 2d 477 (Mo. banc 1979), at 478-79. This type of behavior is not alleged in the present case.

The Court considers both aggravating factor as well as mitigating factors that may justify a reduction in the degree of discipline to be imposed. Ehler, 319 S.W.2d at 451-52. In the case of misconduct based on DWI offenses, the court considers the recklessness of the conduct and number of offenses as aggravating factors. Stewart, 342 S.W.3d at 312. However, mitigating factors include the attorney submitting to intensive substance abuse treatment, regular attendance at Alcoholics Anonymous meetings, full compliance with probation terms, and proper handling of client affairs. Id. Mitigating factors may not justify any reduced level of discipline in cases involving

misappropriation of client funds and dishonesty. *In re Kazanas*, 96 S.W.3d 803 (Mo. banc 2003).

## **B. Argument**

Respondent does not seek to minimize the gravity of his offenses. Respondent realizes that he could have harmed or killed someone while driving in an intoxicated state. However, Respondent did not understand the gravity of his problem, or that he was capable of becoming so intoxicated that he could enter or operate a motor vehicle without making any conscious decision to do so. Respondent acknowledges that discipline is merited.

Respondent admits that he has breached a duty of care owing to the general public and that he has caused embarrassment to his family, to his employer, to the bar and to the legal profession. However, Respondent is neither aware of, nor has he been accused breaching any ethical obligation owing to any client, and his actions have caused no harm to any person or property.

Respondent's mental state was affected by his divorce. *See* Appx p. 2. This does not excuse his conduct, but serves as a mitigating factor. *Tessler*, 783 S.W.2d at 910; *Belz*, 258 S.W.3d at 39; *Kopf*, 767 S.W.2d at 22. Additionally, Respondent's actions did not reflect a repeated indifference to law and public safety. *Cf.*, Informant's Brief, p.8. Respondent sought help from MOLAP for his problem after the August 2007 incident, and he resolved not to mix drinking and driving. Moreover, Respondent made no conscious decision to operate a motor vehicle in either of the latter two incidents. *Madison*, 282 S.W.3d at 360. Respondent is painfully aware that this does not excuse his

conduct. However, Respondent asks the Court to consider that he had no intent to flout the law.

By the grace alone, Respondent caused no actual harm to any person or property. Moreover, he caused no harm stemming from any fraudulent, deceptive, or unethical behavior in relation to any present or past client or any other person.

Finally, Respondent notes several mitigating factors. Once Respondent realized the seriousness of his problem, he took action. He entered into an inpatient treatment program, and he entered into an agreement with his employer to make himself accountable. Appx p. 6. Respondent does not merely profess a commitment to sobriety. Stewart, 342 S.W.3d at 311. Respondent has practiced complete sobriety for a period of nineteen months and counting. Respondent has come to terms with the issues that caused his depression, and he seeks to rebuild his life. Appx p. 5.

Respondent's transition to a sober lifestyle is made easier by the fact that Respondent drank only during a five-year period. Although severe in nature, Respondent's drinking career has been limited in duration.

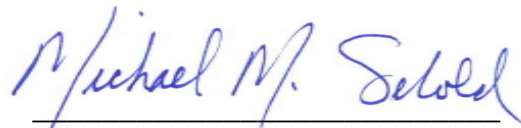
Respondent respectfully asks that the Court impose a discipline short of active suspension. The Court has stated that one purpose of discipline is to set a example to deter other attorneys from engaging in similar conduct. Stewart, 342 S.W.3d at 309. Although there may be benefits from such cautionary tales, attorneys must also benefit from knowing that the Court encourages and rewards attempts at rehabilitation. See Ehler, 319 S.W.3d at 452 (attorney initially given period of probation for purposes of rehabilitation and education). Respondent takes seriously and has respected the

commitment he made to employer. Appx p. 6. Should Respondent be permitted to continue practicing law, he would respect and ***not*** take lightly such an opportunity.

### **C. Conclusion**

Respondent respectfully asks the Court to impose a discipline short of active suspension.

Respectfully submitted,



Michael M. Sebold, #43248

Respondent, *pro se*

[msebold55@gmail.com](mailto:msebold55@gmail.com)

5509 Duchesne Parque Dr.

St. Louis, Missouri, 63128

(314) 849-8992 – Phone

(314) 849-8992 - Facsimile

## **SUPREME COURT RULE 84.06**

### **CERTIFICATE OF COMPLIANCE**

In accordance with Supreme Court Rule 84.06(c) the undersigned hereby certifies:

1. Respondent's Brief includes the information required by Supreme Court Rule 55.03;
2. Respondent's Brief complies with the word count and other limitations contained in Supreme Court Rule 84.06(b);
3. The word count of Respondent's Brief is approximately 1459 words, excluding the Table of Contents, Table of Authorities, the Signature Block, and the Certificate of Service; and
4. Microsoft Security Essentials was used to scan CD Rom disk submitted to opposing counsel, and that these were found to be virus free.



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two true and correct copies of Respondent's Brief, along with the Appendix, together with a CD ROM disk containing an electronic copy of the same was delivered by email this 19<sup>th</sup> day of January, 2012, and by first class U.S. Mail, postage prepaid, to:

Alan D. Pratzel, Esq.  
Sam S. Phillips, Esq.  
Sharon Weedin, Esq.  
Office of Chief Disciplinary Counsel  
3335 American Avenue  
Jefferson City, Missouri, 65109  
[sharon.weedin@courts.mo.gov](mailto:sharon.weedin@courts.mo.gov)  
[Sam.Phillips@courts.mo.gov](mailto:Sam.Phillips@courts.mo.gov)



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Michael M. Sebold